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David A. Brenningmeyer
University of Maine School of Law

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THE LIMITED POWER OF FEDERAL BANKRUPTCY COURTS TO STAY ENFORCEMENT OF STATE ENVIRONMENTAL REGULATIONS

I. INTRODUCTION

A. *The Policy Conflict*

Over the course of the past few decades, public awareness of privately created environmental hazards has risen. As a result, state and federal legislatures have been moved to enact comprehensive environmental laws that serve both to remedy past harms and to prevent future ones. Today, environmental statutes seek to correct and prevent public health hazards as diverse as groundwater contamination,¹ toxic waste disposal,² soil contamination,³ destruction of native plant and animal habitats,⁴ and air pollution,⁵ to name but a few. In addition, state and federal courts have permitted the invocation of common law theories, such as nuisance and trespass, to allow recovery in tort for injuries sustained by plaintiffs subjected to harmful environmental conditions.⁶

Unfortunately, as laws creating environmental liabilities have grown in scope and number, the cost of compliance has increased enormously.⁷ For some business operators on the economic margin,

1. See, e.g., Water Pollution Prevention and Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1988).

2. See, e.g., Solid Waste Disposal Act (commonly known as RCRA), 42 U.S.C. §§ 6901-6992k (1988).

3. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988).

4. See, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

5. See, e.g., Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. §§ 7401-7642 (1988), 42 U.S.C.A. §§ 7651-7671q (Supp. 1991).

6. See, e.g., *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975) (plaintiffs allowed to bring tort action for interference with state-recognized "riparian rights" where defendant had caused water pollution and thus impaired plaintiffs' use and enjoyment of the stream bordering their property); *Bagley v. Controlled Envtl. Corp.*, 503 A.2d 823 (N.H. 1986) (contamination of plaintiff's soil and water caused by adjacent landowner's unlawful release of chemicals actionable under negligence theory); *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782 (Wash. 1985) (plaintiffs permitted to sue in trespass for damage to their property caused by airborne particles from defendant's plant). See also Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L J 1126; Comment, *Private Remedies for Water Pollution*, 70 COLUM L REV 734 (1970).

7. See, e.g., Turner T. Smith, Jr., *Interrelationship Between Bankruptcy Law and Environmental Law*, 7 E. MIN L INST § 1.01, at 1-2 (1986), noting that [c]urrent estimates by the Environmental Protection Agency (EPA) are that cleanup costs under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) associated with the 1,800 hazardous waste sites presently scheduled for cleanup

the substantial cost burdens associated with environmental compliance and liability, in conjunction with other ambient economic pressures, present an insurmountable barrier to profitable management. As a result, these individuals may decide to seek protection from their creditors, and from state and federal regulators, under the federal Bankruptcy Code ("Code").⁸

The tension generated when an environmental violator seeks refuge from state regulators under the Code is the result of the conflicting policies which underlie the bankruptcy and environmental laws. The Code, on the one hand, has as its primary purpose relieving "the honest debtor from the weight of oppressive indebtedness and [permitting] him to start afresh,"⁹ and giving the bankrupt "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt"¹⁰ while conserving the debtor's estate for the benefit of his creditors.¹¹ Environmental laws, on the other hand, seek to hold those very violators responsible, financially or otherwise, for the injuries they impose on the public as a result of their violations, and to require debtors to preserve and protect natural resources in the public domain; the long-term financial well-being of the business operator or her creditors is a relatively minor concern. Courts charged with adjudicating such cases, then, "face a difficult policy conflict which pits the concerns of environmental protection against the need to protect the bankrupt and its creditors."¹²

Thus, when the environmental violator files a petition for bankruptcy, "[c]onflict among the various parties is virtually assured."¹³ Government regulatory bodies want to see the debtor's assets used to satisfy environmental liabilities or, in the alternative, to at least enjoin the debtor's continuing violation of environmental laws.

total \$16 billion, and Congress has passed CERCLA amendments that could drive those costs up to \$81 billion or higher. Costs at individual sites can run from under one hundred thousand dollars to over \$350 million.

(citations omitted).

8. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1989).

9. *Williams v. United States Fidelity and Guar. Co.*, 236 U.S. 549, 554-55 (1915) (interpreting the old Bankruptcy Act).

10. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

11. See *In re McGoldrick*, 121 F.2d 746, 751 (9th Cir.) (quoting *In re Ostlund Mfg. Co.*, 19 F. Supp. 836, 838 (D. Or. 1937)), *cert. denied*, 314 U.S. 675 (1941).

12. Douglas P. DeMoss, Note, *The Bankruptcy Code and Hazardous Waste Cleanup: An Examination of the Policy Conflict*, 27 WM & MARY L. REV. 165, 166 (1985). See generally Arlene E. Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 626 (1991); Jonathan K. Van Patten & Richard D. Puetz, *Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy*, 35 S.D. L. REV. 220 (1990); Michael B. Guss, Comment, *Ohio v. Kovacs: The Conflict Between Federal Bankruptcy Laws and State Environmental Regulations*, 34 AM. U. L. REV. 1263 (1985).

13. Smith, *supra* note 7, § 1.02, at 1-4.

These agencies believe that public health and safety concerns should be placed well ahead of fiscal creditor interests in the bankruptcy administration scheme, and that private parties should be forced to bear, and not be permitted to avoid, the environmental costs they impose on society. Creditors, on the other hand, want the bankruptcy courts to insulate the debtor's estate from such environmental claims to the maximum extent possible so that their personal interests in the estate are preserved. They also argue that if actions initiated to enforce environmental laws are allowed to proceed against a reorganizing debtor, the Code's equally important public policy goals of permitting "a distressed business to continue operating, thereby providing jobs, products, and tax revenues"¹⁴ and providing for "[e]fficient administration [which] gives the bankrupt the greatest chance of successful rehabilitation,"¹⁵ will be defeated. A further interest involved is that of the bankruptcy trustee, who will want to minimize the complexity of the administration of the debtor's assets and "avoid, at all costs, any personal liability for environmental violations during the bankruptcy process."¹⁶

These competing interests present federal bankruptcy judges with the task of resolving a conflict which was, as one commentator has noted, only "dimly foreseen by the drafters of the Bankruptcy Reform Act of 1978 . . . and, thus, not adequately provided for [in that Act]."¹⁷ Accordingly, the courts have been compelled to decide cases which involve this policy conflict on what has been characterized as an essentially "ad hoc basis."¹⁸

B. The Legal Issues

One of the questions that arises out of this conflict is whether a state can force a Chapter 11 debtor to correct violations of state antipollution laws, even though such an action would have the effect of depleting assets which would otherwise be available to repay debts owed to general creditors.¹⁹ Stated in the alternative, the issue is whether a federal bankruptcy court judge has the equitable author-

14. DeMoss, *supra* note 12, at 171.

15. *Id.*

16. Smith, *supra* note 7, § 1.02, at 1-4. Creditors may have similar concerns about personal liability. In *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), the Eleventh Circuit held that secured creditors of a bankrupt estate may be held liable for environmental clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), if the creditor's involvement in the management of the debtor's operation rises to a level such that the lender *could* have affected the debtor's waste management decisions.

17. Smith, *supra* note 7, § 1.01, at 1-3.

18. DeMoss, *supra* note 12, at 175.

19. See, e.g., *Penn Terra Ltd. v. Department of Env'tl. Resources, Pa.*, 733 F.2d 267, 269 (3d Cir. 1984).

ity to enjoin a state's enforcement of state environmental laws to protect the interests of creditors. That is the precise issue which was recently addressed by the United States District Court for the District of Maine in *Wilner Wood Products Co. v. Maine Department of Environmental Protection*.²⁰

Wilner Wood provides an excellent illustration of the clash between bankruptcy and environmental law. In that case, a company which was ostensibly on the brink of financial collapse was asked by a state regulatory agency to expend crucial funds to attain compliance status under state air quality laws. Viewed from one angle, the policies underlying the federal Bankruptcy Code might lead one to conclude that the debtor should be permitted to forego compliance temporarily while it focusses on reorganization and rehabilitative efforts. Certainly it is at least arguable that such a policy would serve the public economic interest by allowing the company to continue its manufacturing and employment functions. On the other hand, the policies behind state environmental regulations would seem to lead to the conclusion that the debtor in possession should be required to comply with state law governing health and safety in an ongoing fashion despite the financial burden compliance may cause, and should not be permitted to use the Code to shield itself from the same environmental responsibilities presently borne by the debtor's solvent competitors.

Where is the middle ground? Should bankruptcy be permitted to act as a shield for environmental wrongdoers? If the debtor has only limited financial assets, how can it comply with state environmental laws without placing its creditors at a serious disadvantage? Without compromising its own reorganization efforts? Is the preservation of the debtor's estate to be given greater priority in the Code's administrative scheme than the enforcement of state environmental laws? Has the federal government effectively preempted the states' environmental regulatory power through the Code? Was this a result intended by Congress? While this Comment is of rather limited scope and cannot address all of these issues adequately, the reader is encouraged to bear these questions in mind as we venture a glimpse at the rather extensive, and somewhat confusing, body of law that survives at the bankruptcy-environmental interface.

C. *A Case in Point: Wilner Wood Products Co.*

Wilner Wood Products Company (Wilner Wood) owns and operates a wood products facility in Norway, Maine. Under Maine's anti-pollution laws, operators like Wilner Wood are required to obtain and hold a valid state air emissions license from the Maine Depart-

20. No. 90-0228-B (D. Me. May 10, 1991) (mem.).

ment of Environmental Protection (DEP).²¹ Wilner Wood's emissions license expired in late 1980, and on January 8, 1981, the company applied for license renewal in conformance with state regulations. Under state law, the "expired" license remained valid and in effect until such time as the DEP acted on the renewal application.²²

Due to unexplained delays, the DEP did not address Wilner Wood's application for renewal until 1989. When the application was addressed, Wilner Wood and the DEP discussed the requirements for renewal and agreed that Wilner Wood would conduct and submit a Best Practical Treatment (BPT) analysis²³ within four weeks of the February 12, 1990, notification date.²⁴ Unfortunately, Wilner Wood filed for Chapter 11 reorganization under the federal Bankruptcy Code on February 9, 1990, and was unable to pay its consultant to complete the mandated BPT analysis. As a result, the company did not file the BPT analysis by the March 16, 1990, deadline and did not comply with any of the other requirements for a new license.²⁵

On May 11, 1990, the DEP denied Wilner Wood's license renewal application. Under Maine law, this denial had the effect of discontinuing or revoking the old license, and took effect on May 15, 1990. Wilner Wood appealed the DEP's denial of the renewal application,²⁶ and on the same day the federal bankruptcy court issued an

21. ME. REV. STAT. ANN. tit. 38, § 590 (West Supp. 1990-1991), provides in part:

After ambient air quality standards and emission standards have been established within a region, the board [of Environmental Protection] may by rule provide that no person may operate, maintain or modify in that region any air contamination source or emit any air contaminants therein without an emission license from the department [of Environmental Protection].

...

The department shall have the authority to deny any air emission license . . . when it determines that the source will not comply with the requirements imposed pursuant to the Federal Clean Air Act

22. *Id.*

23. Under Maine law, operators like Wilner Wood have to demonstrate that: (1) the proposed emissions will be receiving the best practical treatment (BPT); (2) the proposed emissions will not violate applicable air emissions standards; and (3) the proposed emissions, either alone or in conjunction with existing emissions from other sources, will not violate applicable ambient air quality standards. *See id.*

24. It was not until February 12, 1990, that the DEP notified Wilner Wood of the proper format of the BPT analysis. As a result, the analysis had not yet begun on that date. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B, slip op. at 2 (D. Me. May 10, 1991) (mem.).

25. *Id.*

26. Wilner Wood appealed the DEP's denial of the renewal application on the ground that the DEP acted in an arbitrary and capricious manner when it suddenly, after ten years of regulatory inaction, demanded compliance with state air emissions standards within 30 days of providing the format of the BPT analysis. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection* (*In re Wilner Wood Prods. Co.*) 119

ex parte restraining order enjoining the State of Maine and the Commissioner of Environmental Protection from acting on its denial of the renewal application until Wilner Wood's appeal of the denial was complete.²⁷

On May 18, 1990, the parties appeared at a hearing before the bankruptcy court to argue the validity of the issuance of a preliminary injunction against the DEP.²⁸ At oral argument, the State represented that it would not attempt to collect civil fines against the debtor until entry of the judgment on administrative appeal,²⁹ but refused to assure the court that it would not then seek retroactive penalties to May 15, 1990.³⁰ The bankruptcy judge, expressing not a little dismay over the DEP's sudden insistence on compliance after a ten-year lapse of administrative attention, concluded that Wilner Wood had met all the elements necessary for issuance of a preliminary injunction pending an administrative appeal,³¹ and invoked the

B.R. 345, 348 (Bankr. D. Me. 1990) [hereinafter *Wilner Wood II*].

27. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B, slip op. at 2-3 (mem.).

28. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection (In re Wilner Wood Prods. Co.)*, 119 B.R. 342 (Bankr. D. Me. 1990) [hereinafter *Wilner Wood I*].

29. *Id.* at 345.

30. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B, slip op. at 2-3.

31. Relying on Fed. R. Civ. P. 65, the court noted that in order to obtain a preliminary injunction against the State, the debtor had to establish four elements: (1) the likelihood of success on the merits; (2) irreparable injury to the movant; (3) the balance of equities favors relief; and (4) the public interest favors relief. *Wilner Wood I*, *supra* note 28, at 343 (citing *Hypertherm, Inc. v. Precision Prods., Inc.*, 832 F.2d 697 (1st Cir. 1987); *In re Security Gas & Oil, Inc.*, 70 B.R. 786 (Bankr. N.D. Cal. 1987)).

With regard to the first element, the court noted that, even taking a narrow view of this requirement, there was indeed evidence which indicated that the DEP had acted arbitrarily in denying the renewal application and a likelihood that Wilner Wood would succeed in the administrative appeal on that basis. As to the second element of the test, the court concluded:

[I]f the effectiveness of the May 11, 1990 DEP order is not enjoined pending the debtor's appeal to the Maine Board of Environmental Protection, irreparable harm will result. Without an injunction, the debtor will either have to shut down operations and terminate the employment of one hundred and fifty people, or continue to operate without a valid license, in clear violation of state law. The record indicates that either course would probably lead to the early demise of this reorganization case, and result in liquidation in Chapter 7. In these circumstances, the irreparable harm element has been easily proved.

Wilner Wood II, *supra* note 26, at 347. The court also held that Wilner Wood had met the other two elements of the test since the "State DEP's argument that an injunction will interfere with its 'institutional policy' of administering its own laws falls far short of the harm which will befall the debtor and its employees if the injunction is not issued," and because, in part, "the State's unexplained ten-year delay makes a self-inflicted mockery out of the argument that any possible violation is of an emergency nature." *Id.* at 348.

court's perceived equitable powers under section 105 of the Code³² to enjoin enforcement of the DEP's May 15, 1990, order.³³

32. 11 U.S.C. § 105 provides:

(a) *The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.* No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) *The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28.* This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

11 U.S.C. § 105 (1988) (emphases added).

33. The court concluded, after a brief review of three cases (*In re Professional Sales Corp.*, 56 B.R. 753 (Bankr. N.D. Ill. 1985), *In re Security Gas & Oil, Inc.*, 70 B.R. 786 (Bankr. N.D. Cal. 1987); and *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989)), that § 105 "does indeed grant the Bankruptcy Court the authority to enjoin the effectiveness of the DEP's May 11, 1990 order, pending the appeal." *Wilner Wood II*, *supra* note 26, at 349.

Once the court asserted this authority, it remained to be determined whether the court *should* have invoked its perceived equitable powers under § 105 to enjoin the DEP enforcement action. In addressing this question, the court referenced a nine-part test formulated in *In re Security Gas & Oil, Inc.*, 70 B.R. at 796-97, to aid it in its exercise of equity jurisdiction. The court in *Security Gas & Oil* suggested that the following factors be weighed when a bankruptcy court is trying to determine whether or not the facts of a particular case warrant an injunction:

- (1) The immediacy, severity, and certainty of the danger created by the environmental hazard subject to the clean-up order;
- (2) The extent to which debtor is uniquely able to effect the clean up;
- (3) The extent to which creditor priorities would be distorted by enforcement of the clean-up order;
- (4) The effect of the enforcement order on the likelihood of a successful reorganization, and whether a successful reorganization will substantially increase the payoff to creditors and/or preserve jobs;
- (5) How long the bankruptcy case has been open;
- (6) How long the State has delayed in attempting to force debtor to clean up the environmental hazard;
- (7) The extent to which debtor continues to operate a similar business in the State;
- (8) The extent to which orders other than full prohibition of enforcement of clean-up orders can better accommodate the State health and welfare concerns with the policies of the Bankruptcy Code; and
- (9) Any other considerations relevant to whether injunctive relief should be granted, including the good or bad faith of the parties.

Wilner Wood I, *supra* note 28, at 343-44. After assessing these considerations, the *Wilner Wood I* court determined that elements 1, 4, 5, 6, and 9 were controlling on the facts of the case. Given that the DEP had delayed enforcement of its air emissions standards against *Wilner Wood* for over 10 years, that the company was actively

On appeal, the United States District Court for the District of Maine vacated the bankruptcy court's order.³⁴ The court reasoned that 28 U.S.C. § 959(b), which requires the trustee of a reorganizing estate to operate the debtor's property in accordance with state law,³⁵ foreclosed the bankruptcy court's exercise of equity jurisdiction in granting the section 105 "discretionary stay." Rejecting the appellee's contention that a bankruptcy court has the power under section 105 to enjoin *any* activity which would threaten the assets of the debtor's estate, the court held that, under section 959(b), "[t]here is no exception for debtors who would be inconvenienced or burdened by State laws."³⁶

While acknowledging the existence of authority to the contrary, the court concluded that the "better-reasoned cases,"³⁷ in conjunction with the explicit language of section 959(b) and the "[v]ague legislative history"³⁸ behind section 105, commanded reversal of the bankruptcy court's order granting the debtor an injunction. In finding the grant of the section 105 discretionary stay an illegitimate exercise of power under section 959(b), the court held: "The bankruptcy court cannot issue an injunction against the State that, even on a temporary basis, [abrogates the State's exercise of police power and] effectively grants [the debtor] a license."³⁹

II. ANATOMY OF THE CODE

A. *The Automatic Stay: Legal Powers Under Section 362*

The automatic stay provision of the Bankruptcy Code, 11 U.S.C.

working to comply with the DEP licensing requirements, that the company would be forced to close if the injunction was not granted, and that the debtor's reorganization effort was still quite young, the court decided to invoke its perceived § 105 powers and enjoin the state police power action. *Id.* at 344. The court held that, as a matter of policy, the debtor's "positive efforts should not be frustrated and/or wasted because of the DEP's sudden insistence on shutting down the business of the debtor, after a decade of bureaucratic inattention," and that "enforcement of the DEP Order, at this time, will, *without doubt, unduly and unnecessarily interfere with Bankruptcy adjudication and administration of this case.* *Id.* (emphasis added).

34. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B, slip op. at 8 (D. Me. May 10, 1991) (mem.).

35. Section 959(b) provides:

[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959(b) (1988) (emphasis added).

36. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B, slip op. at 4.

37. *Id.* at 6-7 n.3.

38. *Id.* at 7.

39. *Id.* at 4-5.

§ 362(a),⁴⁰ generally operates to prevent interference with the debtor's property upon the filing of a petition for bankruptcy by prohibiting commencement or continuation of a judicial or administrative proceeding against the debtor that could have been initiated pre-petition, or recovery on a pre-petition claim.⁴¹ The stay's scope is broad⁴² and is recognized as "one of the fundamental debtor pro-

40. Section 362(a) provides:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a) (1988).

41. Only pre-petition claims are at issue in bankruptcy cases since debts which arise post-petition are not subject to discharge under the Code. *See, e.g., In re Jensen*, 114 B.R. 700, 706 (Bankr. E.D. Cal. 1990).

42. *See* S. REP. NO. 95-989, 95th Cong., 2d Sess. 50 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5836; H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6297 ("The scope of [section 362(a)] is broad. All proceedings are stayed, including arbitration, . . . administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions as well, and all proceedings even if they are not before government tribunals."). *See also* 2 WILLIAM M COLLIER, COLLIER ON BANKRUPTCY ¶ 362.04, at 362-32 (Lawrence P. King et al. eds., 15th ed. 1991) [hereinafter 2 COLLIER ON BANKRUPTCY] ("The stay of section 362 is extremely broad in scope and . . . should apply to almost any type of formal or informal action against the debtor or property of the estate.").

Under 11 U.S.C.A. § 101(15) (West 1991), the term "entity" is broadly defined to include any "person, estate, trust, governmental unit, and United States trustee." It has been described as "the most inclusive of the various terms relating to bodies or units." Additionally, the term "claim" refers broadly to the

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

tections provided by the bankruptcy laws."⁴³ Its primary purpose is to provide the debtor with a "breathing spell" and to "replace an unfair race to the courthouse with an orderly liquidation procedure designed to treat all creditors equally."⁴⁴ Unquestionably, actions initiated by states to enforce their environmental laws, such as the DEP enforcement action in *Wilner Wood*, fall within the scope of this section.⁴⁵

However, the application of the automatic stay is further governed by the express exceptions Congress has enumerated in section 362(b). For instance, under subsections (b)(4) and (b)(5) the automatic stay provision will not operate against state or federal agencies seeking to enforce their police powers in a good faith,⁴⁶ non-discriminatory manner,⁴⁷ *unless* such agencies are seeking to enforce

undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured;

11 U.S.C.A. § 101(5) (West Supp. 1991).

43. See S. REP. No. 95-989, 95th Cong., 2d Sess. 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41; H.R. REP. No. 95-595, 95th Cong., 2d Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97. "[Section 362] stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy."

44. *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988). See also *In re Kish*, 41 B.R. 620, 624 (Bankr. E.D. Mich. 1984) ("The primary purpose of § 362 is to prevent the piecemeal liquidation of a debtor company by the piranha-like attacks of creditors."); S. REP. No. 95-989, 95th Cong., 2d Sess. 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835; H.R. REP. No. 95-595, 95th Cong., 2d Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6297 ("Without [section 362], . . . [creditors] who acted first would obtain payment of [their] claims in preference to and to the detriment of other creditors.").

45. See *In re Commonwealth Oil Ref. Co. v. United States Env'tl. Protection Agency*, 805 F.2d 1175, 1186 (5th Cir. 1986) (an attempt to bring a Chapter 11 debtor "into compliance with state and federal environmental laws . . . 'falls squarely within the [government's] police and regulatory powers [and hence is subject to the provisions of § 362]. . . . No more obvious exercise of the [government's] power to protect the health, safety and welfare of the public can be imagined.'") (citing *Penn Terra Ltd. v. Department of Env'tl. Resources, Pa.*, 733 F.2d 267, 274 (3d Cir. 1984)).

46. See *In re Beker Indus. Corp.*, 57 B.R. 611, 627 (Bankr. S.D.N.Y. 1986) (section 362(b) exceptions apply only when states act in good faith to enforce their police powers).

47. 11 U.S.C. § 525 (1988) (Protection against discriminatory treatment) provides, in pertinent part:

(a) Except as provided in the Perishable Agricultural Commodities Act . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person that is or has been a debtor under this title . . . solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is

a previously obtained "money judgment."⁴⁸ Thus, in order to determine whether the automatic stay applies in a given case, one must address two central questions: (1) Whether the state's actions qualify as a good faith exercise of its "police or regulatory" powers, and, if so, (2) Whether the state's actions are in substance merely an effort to enforce a money judgment.

1. *The Police Power Exception to the Automatic Stay*

The exceptions listed in section 362(b)(4) relate only to those actions which would otherwise be automatically stayed under section 362(a)(1). The legislative history of this subsection makes clear Congress' intention to except from the automatic stay proceedings initiated by a governmental unit to protect public health and safety, and to include in the exception, at the very minimum, at least *some* types of environmental enforcement actions:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.⁴⁹

However, while the term "police or regulatory power" is quite

granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

For example, in *In re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985), the court stated that a government agency cannot revoke a license or permit solely because the debtor is insolvent or has not paid a dischargeable debt, but can revoke if some other alternate non-financial explanation is given (e.g., debtor has committed a statutory violation of the permit conditions, debtor's ongoing licensed activities pose a danger to the public health and safety, etc.). *Id.* at 760 n.4. See also *In re Rath Packing Co.*, 35 B.R. 615, 619 (Bankr. N.D. Iowa 1983) (noting various interpretations of the phrase "solely because" in the context of § 525).

48. Section 362(b) of the Code provides, in pertinent part:

The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

. . .

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

11 U.S.C. § 362(b) (1988) (emphasis added).

49. S. REP. NO. 95-989, 95th Cong., 2d Sess. 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838 (emphasis added); H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 343 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6299 (emphasis added).

broad,⁵⁰ this section stops short of granting states unlimited discretion to bring actions against reorganizing debtors under any and all circumstances. Rather, the exception is to be "construed to apply to the enforcement of state laws affecting health, welfare, morals and safety, but *not* to 'regulatory laws that directly conflict with the control of the *res* or property [of the estate] by the bankruptcy court.'"⁵¹ Moreover, the exception does not apply to actions initiated by a governmental unit merely to protect its pecuniary interest in property of the debtor or estate.⁵²

Still, while some environmental enforcement actions may be rightly characterized as pecuniary in nature (e.g., bringing suit against a debtor to fix liability for environmental violations), there is little indication that this "exception to the exception" is anything like a panacea for environmental debtors. The great weight of authority recognizes that such actions, while facially pecuniary, also have a deterrent function and hence serve a legitimate non-pecuniary state interest. Thus, anytime a non-pecuniary state interest is served by bringing an enforcement action, even where such is inexorably tied to a concurrent pecuniary interest, the action will be permitted to proceed under subsection 362(b)(4).⁵³

50. See *Penn Terra Ltd. v. Department of Env'tl. Resources, Pa.*, 733 F.2d 267, 273 (3d Cir. 1984) ("Congress intentionally used such a broad term as 'police and regulatory powers' . . . and no unnatural efforts [should] be made to limit its scope.").

51. *In re Cash Currency Exch., Inc.*, 762 F.2d 542, 555 (7th Cir. 1985) (emphasis added). See *Missouri v. United States Bankruptcy Court for the E.D. of Ark.*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); see *infra* notes 72-88 and accompanying text.

52. The "pecuniary interest" rule is derived from an excerpt contained in the legislative history of § 362(b)(4):

This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and *not* to apply to actions by a governmental unit to protect a *pecuniary* interest in property of the debtor or property of the estate.

124 CONG. REC. S17406 (daily ed. Oct. 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6513 (statement of Sen. DeConcini) (emphasis added); 124 CONG. REC. H11089 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-6445 (statement of Rep. Edwards) (emphasis added).

Under this rule, "reviewing courts must distinguish between proceedings that adjudicate private rights [of the state] and those that effectuate public policy." *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988). While a government entity will be permitted to enforce laws against the debtor which serve the public health, welfare, safety, and morals, it does not have "standing" to sue a debtor to protect its pecuniary interests under § 362(b)(4). See *City of New York v. Exxon Corp.*, 112 B.R. 540, 545 (S.D.N.Y. 1990). See also *Missouri v. United States Bankruptcy Court for the E.D. of Ark.*, 647 F.2d at 776 (holding that state statutes which are pecuniary in nature, and which do not relate primarily to matters of public safety and health, do not fall within the § 362(b)(4) exception).

53. The judicial rule that has evolved from the legislative history of § 362(b)(4), see *supra* note 52, is that a state enforcement action will always be excepted from the

In fact, there is little hope that a debtor faced with an environmental enforcement action will be able to avoid the expense associated with appearing in an administrative tribunal by challenging the action under the pecuniary interest rule.⁵⁴ The legislative history provides some anecdotal evidence which suggests that the 1973 version of section 362 was specifically revised in the current Act to preclude an interpretation of that section which would allow a debtor to shield itself from proceedings initiated by a state to enforce its anti-pollution laws. Speaking in regard to the proposed 1978 revision (which was later adopted as law), the House Report noted:

The new stay expands coverage in some areas, reduces it in others, and clarifies many uncertain aspects of the current [1973] provisions.

Under present [1973] law, there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws. The [present] bill excepts these kinds of actions from the automatic stay. The States will be able to enforce their police and regulatory powers free from the automatic stay.⁵⁵

Perhaps reflecting the clarity of the legislative history, courts seem to be in accord on this point: the enforcement of state and federal environmental laws "falls squarely within the § 362(b)(4) police and regulatory exception to the automatic stay."⁵⁶ Indeed, at least one

automatic stay unless it is brought *solely* to protect the state's pecuniary interest. See, e.g., *City of New York v. Exxon Corp.*, 112 B.R. at 540; *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988); *In re Commerce Oil Co.*, 847 F.2d 291 (6th Cir. 1988); *United States v. Mattiace Indus.*, 73 B.R. 816 (E.D.N.Y. 1987); *United States v. Standard Metals Corp.*, 49 B.R. 623 (D. Colo. 1985); *United States v. Energy Int'l, Inc.*, 19 B.R. 1020 (S.D. Ohio 1981); *In re Lenz Oil Serv.*, 65 B.R. 292 (Bankr. N.D. Ill. 1986).

54. This, of course, does not preclude evasive action under §§ 362(b)(5) or 105. See discussion *infra* parts II.A.2 and II.B.

55. HEARINGS ON H.R. 31 AND H.R. 32 BEFORE THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 94th Cong., 1st and 2d Sess. 166, (1975-76) reprinted in 1978 U.S.C.C.A.N. 6127, 6135 (statement of David H. Williams, Federal Trade Commission) (footnotes omitted) (citing H.R. 8200 § 101 (proposed 11 U.S.C. § 362(b)(4))).

56. *In re Commonwealth Oil Ref. Co. v. United States Env'tl. Protection Agency*, 805 F.2d 1175, 1186 (5th Cir. 1986). See also *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988) (noting that the § 362(b) exceptions were fashioned "[to] combat the risk that the bankruptcy court would become a sanctuary for environmental wrongdoers . . ."); *In re Commerce Oil Co.*, 847 F.2d 291, 296 (6th Cir. 1988) ("Punishing wrongdoers, deterring illegal activity, [and] recovering remedial costs of damage to the environment . . . are exercises of the state's regulatory power . . . and

court has noted that "[n]one of the cases that have applied the pecuniary interest rule in holding section 362(b)(4) inapplicable have involved . . . environmental legislation."⁵⁷

2. *The Money Judgment Exception to the Automatic Stay*

Concluding that a state action has been taken in furtherance of a state's police and regulatory powers is only the first step in the analysis of the automatic stay provision. Subsection 362(b)(5) further provides an "exception to the exception" to the extent that actions brought to enforce money judgments *are* affected by the automatic stay *even if* such actions were brought pursuant to the government's police and regulatory powers.⁵⁸ Under this provision, the *entry* of a money judgment is permitted (so long as such an action passes muster under the 362(b)(4) exception), but the *enforcement* of a money judgment is not.⁵⁹ The legislative history provides insight into the

are not actions based upon the state's [pecuniary] property interests."); *In re Norwesco Dev. Co.*, 68 B.R. 123, 128 (Bankr. W.D. Pa. 1986) ("The police powers inherent in environmental protection laws are excepted from the automatic stay . . ."); *United States v. Standard Metals Corp.*, 49 B.R. at 625 (the express purpose of § 362(b)(4) is to prevent "endangerment of the public that would result from permitting a bankrupt to avoid statutes and regulations enacted in furtherance of governmental police powers"); *In re Williston Oil*, 54 B.R. at 12 (the state's police power "necessarily includes the state's attempts to force debtors to rectify harmful environmental hazards").

57. *United States v. Mattiace Indus.*, 73 B.R. 816, 819 (E.D.N.Y. 1987).

58. Section 362(b)(5) of the Code provides:

The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

. . .

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . .

11 U.S.C. § 362(b)(5) (1988) (emphasis added). The corollary of this provision is, of course, that enforcement proceedings initiated by governmental units which seek *injunctive* relief are not stayed under §§ 362(a) or 362(b)(4)-(5). See, e.g., *SEC v. First Fin. Group of Texas*, 645 F.2d 429, 437 (5th Cir. 1981).

59. See, e.g., *In re Lenz Oil Serv.*, 65 B.R. 294 (Bankr. N.D. Ill. 1986):

"The distinction between entry and enforcement of a money judgment is clear. The first is free of the automatic stay; the second is stayed. Congress allows governmental units to get money judgments in pursuit of their police power, but forces them to wait in line like all other creditors to get the judgment enforced."

Id. at 295 (quoting *Illinois v. Electrical Utils.*, 41 B.R. 874, 877 (N.D. Ill. 1984)). See also *United States v. Nicolet, Inc.*, 857 F.2d 202, 207, 209 (3d Cir. 1988); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1183 (5th Cir. 1986); *City of New York v. Exxon Corp.*, 112 B.R. 540, 545 (S.D.N.Y. 1990); *United States v. F.E. Gregory & Sons, Inc.*, 58 B.R. 590, 592 (W.D. Pa. 1986); *United States v. Standard Metals Corp.*, 49 B.R. 623, 625 (D. Colo. 1985); *United States v. Ilco, Inc.*, 48 B.R. 1016, 1024 (N.D. Ala. 1985); *United States v. Energy Int'l, Inc.*, 19 B.R. 1020, 1021 (S.D. Ohio 1981); *In re Williston Oil Corp.*, 54 B.R. 10, 12 (Bankr. D. N.J. 1984).

operation and policy behind this provision:

Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the *entry* of a money judgment, but does not extend to permit *enforcement* of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.⁶⁰

Unfortunately, Congress did not provide a definition of the term "enforcement of a money judgment" and, as a result, this exception has generated a great deal of litigation. Debtors, on the one hand, have persistently argued that any time a government unit seeks to compel a reorganizing debtor to take action which will require an expenditure of money, the proceeding is, in effect, one which seeks the "enforcement of a money judgment." Government regulatory agencies, on the other hand, contend that an enforcement action should be considered one seeking "the enforcement of a money judgment" only if the judgment rendered would contain a definite and certain statement of the amount owed.

The prevalent view on this issue was adeptly expressed by the Third Circuit in *Penn Terra Ltd. v. Department of Environmental Resources, Pennsylvania*.⁶¹ In that case the court noted that where Congress has failed to provide a legislative definition of a statutory term, the meaning must be "gleaned from the commonly accepted usage and from whatever indications of congressional intent we find persuasive."⁶² Then, after turning to an analysis of tradition and legal custom, the court explained:

In common understanding, a money judgment is an order entered by the court or by the clerk, after a verdict has been rendered for [the] plaintiff, which adjudges that the defendant shall pay a sum of money to the plaintiff. Essentially, it need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a *definite* and *certain* designation of the amount which plaintiff is owed by the defendant.

The paradigm for . . . a proceeding [to enforce a money judgment] is when, having obtained a judgment for a sum certain, a plaintiff attempts to seize property of the defendant in order to satisfy that judgment. It is this seizure . . . which is proscribed by

60. S. REP. NO. 95-989, 95th Cong., 2d Sess. 52, (1978) *reprinted in* 1978 U.S.C.A.N. 5787, 5838 (emphasis added); H R REP NO 95-595, 95th Cong., 2d Sess. 343 (1978), *reprinted in* 1978 U.S.C.A.N. 5787, 6299 (emphasis added).

61. 733 F.2d 267 (3d Cir. 1984).

62. *Id.* at 274-75.

subsection 362(b)(5).⁶³

The court went on to note that one important factor to keep in mind in determining whether an action is indeed one "to enforce a money judgment" is whether the claim asserted seeks compensation for past damages or protection against future harms; a proceeding which is initiated to compensate for past harms will generally be one which seeks enforcement of a money judgment, while an action instituted to enjoin present or future wrongful acts will not.⁶⁴ The *Penn Terra* approach has been adopted by the great majority of courts addressing the interpretation of this provision.⁶⁵

Against this backdrop stands a single case which, in dicta, seems to accept the proposition that a state court judgment which requires a debtor to take action which will require an expenditure of money is, in fact, an action "to enforce a money judgment."⁶⁶ In a rather confusing opinion, the court in *In re Thomas Solvent Co.* apparently

63. *Id.* at 275 (footnotes omitted).

64. *Id.* at 276-77.

65. See, e.g., *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1086-89 (3d Cir. 1987) (consent decree requiring debtor to install pollution control equipment not stayed under the "money judgment" exception since order sought to prevent future harm); *In re Commonwealth Oil Ref.*, 805 F.2d 1175, 1186-88 (5th Cir. 1986) (the incidental expense which a debtor will incur to comply with environmental laws does not convert an action into an enforcement of a money judgment); *In re Chateaugay Corp.*, 112 B.R. 513, 523 (S.D.N.Y. 1990) (an injunctive order to remedy a situation resulting from pre-petition conduct is not a "money judgment" simply because it requires the debtor to expend money); *United States v. Ilco, Inc.*, 48 B.R. 1016, 1024 (D.D.C. 1985) (order requiring debtor to perform cleanup in compliance with federal clean water and hazardous waste statutes not a "money judgment" since the order merely seeks to protect State's citizens from future harm); *In re Torwico Elects., Inc.*, 131 B.R. 561, 572 (Bankr. D.N.J. 1991) (obligations to clean up pre-petition environmental contamination should generally be defined as "money judgments"); *In re Security Gas & Oil, Inc.*, 70 B.R. 786, 790-91 (Bankr. N.D. Cal. 1987) (court action requiring debtor to reclaim abandoned oil wells not a "money judgment" since action did not seek monetary sum for compensation, but rather was intended to prevent future harm); *In re Norwesco Dev. Co.*, 68 B.R. 123, 129 (Bankr. W.D. Pa. 1986) (an action is one to enforce a money judgment only if it sounds compensatory rather than preventive, or "sounds in restitution"); *United States v. F.E. Gregory & Sons, Inc.*, 58 B.R. 590, 591-93 (Bankr. W.D. Pa. 1986) (order requiring debtor to reclaim an abandoned mine site not a "money judgment" since the purpose of the order was to prevent future environmental harm and the order did not require payment of a sum certain); *In re Laurinburg Oil Co.*, 49 B.R. 652, 654 (Bankr. M.D. N.C. 1984) (State's action seeking to compel debtor to abate violations of state water pollution laws not stayed under the "money judgment" exception).

See also 2 COLLIER ON BANKRUPTCY, *supra* note 42, ¶ 362.05, at 362-48, noting that:

By far the greatest amount of judicial activity under section 362(b)(4) has to do with the enforcement of environmental laws. Most courts have concluded that section 362(b)(4) will permit a governmental unit to fix civil liability and to enforce present compliance with environmental laws, even where an expenditure of funds may be necessary as long as no attempt is made to collect on a judgment based upon past violations.

66. See *In re Thomas Solvent Co.*, 44 B.R. 83 (Bankr. W.D. Mich. 1984).

misapplied the holding of the Sixth Circuit in *In re Kovacs (Kovacs II)*⁶⁷ and, after asserting that subsection 362(b)(5) was not directly at issue, indicated that a state court judgment requiring the debtor to take action to correct ongoing environmental hazards at an estimated cost of over two and one-half million dollars could be stayed as an action to enforce a money judgment.

While the court's opinion in *Thomas Solvent* represents a lone voice in the wilderness, at least one facet of the court's rationale does have some instinctive appeal. After taking note of the policy language in the legislative history of subsection 362(b)(5) to the effect that a governmental unit should not be permitted to extract funds from the debtor's estate to the detriment of all other creditors,⁶⁸ the court reasoned that a governmental unit should not be permitted to enforce actions which would have the effect of depleting the funds of the estate. Such a policy, the court noted, would discourage potential trustees from becoming involved in administration of the estate (for fear they would not be compensated for the costs and expenses incurred throughout administration) and would thus threaten the effective liquidation and/or administration of the estate.⁶⁹

However, such an interpretation appears to be logically foreclosed by the operation of the Code. As the Third Circuit noted in *Penn Terra*, nearly every granted state request for injunctive relief to compel performance will cost the defendant *something*. Thus, a broad definition of "money judgment" like that suggested in *Thomas Solvent* (i.e., "any order which requires the expenditure of money") would narrow the exception for government police action under subsection 362(b)(5) "into virtual nonexistence."⁷⁰ Since such an interpretation is at odds with the plain meaning of subsection 362(b)(5) and would have the effect of preempting a state's authority to protect public health and safety via the police powers, it may not stand.⁷¹

67. 717 F.2d 984 (6th Cir. 1983), *aff'd*, 469 U.S. 274 (1985). In *Kovacs II*, the State admitted that its claim was compensatory in nature and that the *only* way the debtor could satisfy the judgment was through the payment of a sum certain. *Id.* By contrast, the State in *Thomas Solvent* was seeking to prevent a future harm by getting an *injunction* which would have required the mere expenditure of money. Under the *Penn Terra* analysis, the action in *Kovacs II* would clearly qualify as one seeking the "enforcement of a money judgment," while the action in *Thomas Solvent* would not. See *supra* text accompanying notes 62-64.

68. See *supra* text accompanying note 61.

69. *In re Thomas Solvent Co.*, 44 B.R. at 88.

70. *Penn Terra Ltd. v. Department of Env'tl. Resources, Pa.*, 733 F.2d 267, 277-78 (3d Cir. 1984).

71. See, e.g., *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (preemption must either be explicit, or compelled due to an unavoidable conflict between state and federal law); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (preemption analysis begins with the basic assumption that Congress did not intend to

3. *Automatic Stay of Acts to Obtain Property of the Estate*

If a state environmental enforcement action qualifies as an exercise of the state's police power, and is not initiated to enforce a money judgment against the debtor's estate,⁷² there remains one question which still must be addressed under section 362 to determine whether the state may go forward with an enforcement proceeding against a reorganizing debtor. Under subsection 362(a)(3), the state may not bring any suit against the debtor which constitutes an "act to obtain possession of property of the estate"⁷³ Since the subsection (b) exceptions to the automatic stay do not apply to subsection 362(a)(3),⁷⁴ even a state suit filed pursuant to enforcement of its police powers through non-monetary judgment means is stayed if the enforcement qualifies as an action to obtain or control property of the estate.

This section is most often cited in the environmental context by debtors who seek to stay revocation of a state-issued operating license or permit. The bankrupt typically argues that the license represents a property right, and that such an interest clearly falls within the broad definition of "property of the estate" under section 541 of the Code.⁷⁵ Revocation, it is contended, is an "act to obtain property of the estate," and is stayed as such under subsection 362(a)(3). State administrative agencies, on the other hand, argue that state-issued regulatory licenses and permits are not "property of the estate" in the conventional sense, and so revocation actions are not stayed under that subsection. Furthermore, the agencies ar-

displace state law).

72. See discussion *supra* parts II.A.1 and II.A.2.

73. For the full text of this provision, see *supra* note 40.

74. See *supra* note 48.

75. 11 U.S.C. § 541 provides in part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests of the debtor in property as of the commencement of the case.*

. . .

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or

(2) any interest of the debtor as a lessee under a lease of non-residential real property . . . ; or

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965

. . .

(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541 (1988 & Supp. 1991) (emphasis added).

gue that even *if* licenses are to be brought within the definition of "estate property," state revocation of such licenses cannot properly be characterized as an action to "obtain or control" such "property."

Though the rationale varies from jurisdiction to jurisdiction, most courts are in agreement that license revocation proceedings are indeed not acts to obtain control or possession of a debtor's property.⁷⁶ For instance, in expressing the narrower view of the majority position, the court in *In re Professional Sales Corp.*⁷⁷ noted in dicta that the Environmental Protection Agency's termination of the debtor's "interim status" under the Resource Conservation and Recovery Act⁷⁸ was not stayed under subsection 362(a)(3) because the revocation of such a permit or privilege did not involve the taking of "tangible property" from the debtor.⁷⁹ The court noted that the termination "in no way interfere[d] with the bankruptcy court's exclusive jurisdiction over the debtor's property,"⁸⁰ and did not consider "plausible" the argument that subsection 362(a)(3) would operate to stay the agency action.⁸¹

However, the great majority of courts that have addressed this issue have employed a somewhat different approach. These courts concede, as it seems they logically must, that licenses and permits do qualify as "property" under the broad definition provided in section 541,⁸² but they do not apply subsection 362(a)(3) to license revocations because acting to deny or revoke a license, permit, or other

76. 56 B.R. 753 (Bankr. N.D. Ill. 1985).

77. *Id.*

78. 42 U.S.C. §§ 6901-6992k (1988).

79. *In re Professional Sales Corp.*, 56 B.R. at 764. However, note that neither § 541 nor the legislative history of the Code restricts the definition of property to "tangible" interests. In fact, a statement appended to the House report specifically noted that "property of the estate" includes "all interests, such as interests in real or personal property, tangible and *intangible* property, choses in action, causes of action, rights such as copyrights, trade-marks, patents, and processes, contingent interests and future interests" HEARINGS ON H.R. 31 AND H.R. 32 BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY, 94th Cong., 1st & 2d Sess. 175 (1978), reprinted in 1978 U.S.C.A.N. 6127, 6136 (statement of David H. Williams, Attorney, Federal Trade Commission) (emphasis added). Such a broad definition would seem to foreclose the conclusion that the very real interest one has in public licenses and permits is not included in the term "property of the estate."

80. *In re Professional Sales Corp.*, 56 B.R. at 764.

81. *Id.* at 763 n.6.

82. See *In re Scott Hous. Sys., Inc.*, 91 B.R. 190 (Bankr. S.D. Ga. 1988) (the term "property of the estate" is broad and includes all legal and equitable interests of the debtor in property; nonconforming use privileges fall within that definition); *In re Beker Indus. Corp.*, 57 B.R. 611 (Bankr. S.D.N.Y. 1986) (order allowing debtor to utilize certain roads in his mining operation was a "license," and hence "property of the estate" within the meaning of the Code); *In re Kish*, 41 B.R. 620 (Bankr. E.D. Mich. 1984) (trustee's position that a public license is included within the broad definition of "property of the estate" was correct); *In re Mason*, 18 B.R. 817 (Bankr. W.D. Tenn. 1982) (state liquor license is a "substantial asset" of the debtor's estate).

privilege does not constitute an act to "obtain possession of or control" such property. These courts distinguish between acts to "obtain property of the estate" (which are stayed) and acts which merely seek to "deprive the estate of property" (which do not fall within the scope of subsection 362(a)(3)). In *In re Kish*,⁸³ for example, the court examined the plain meaning of the terms in subsection 362(a)(3) and held:

The word "obtain", for the purposes of § 362, includes within it not only the loss of the interest by the estate, but the acquisition of that interest by the interested party. If Congress had intended [that public license revocation would fall within the § 362(a)(3) stay], it would have used the words "deprive the estate of" in place of the word "obtain".⁸⁴

Thus, since the state does not initiate a revocation proceeding to convert a license, permit, or other privilege to its own use, the action cannot be properly characterized as one to "obtain" the debtor's property.⁸⁵

Courts that have expressed this view also note that environmental licenses and permits are readily distinguishable from the types of interests that are protected under subsection 362(a)(3) in that the "property right" in such licenses is expressly conditioned upon compliance with statutory requirements and is recognized as fully defeasible. Since noncompliance with the conditions extinguishes the property interest, the debtor has no right to claim a continuing property interest in the license after violation of the conditions occurs, or to assert that a formal action taken by a government unit to withdraw permit privileges constitutes a "threat to the debtor's assets." What government regulation giveth, it may taketh away, and the bankruptcy court hath no power to restore.⁸⁶

83. *In re Kish*, 41 B.R. 620 (Bankr. E.D. Mich. 1984).

84. *Id.* at 623.

85. The legislative history seems to support this interpretation. Both the Senate and House reports indicate that the purpose behind § 362(a)(3) "is to prevent dismemberment of the estate" and to allow "liquidation [to] proceed in an orderly fashion." S. REP. NO. 95-989, 95th Cong., 2d Sess. 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836; H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 341 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6298. This might be interpreted to indicate that § 362(a)(3) was intended to encompass only actions to obtain *liquefiable* or *transferable* property interests of the estate. Since environmental licenses and permits are generally not liquidated or transferred, proceedings initiated to revoke these property interests would fall outside the scope of § 362(a)(3).

86. See *Pension Benefit Guar. Corp. v. Braniff Airways, Inc.*, (*In re Braniff Airways*) 700 F.2d 935, 942 n.5 (5th Cir. 1983) (noting that "whatever vitality the 'threat to assets' theory may have, it is inapplicable where . . . the very existence of the 'asset' depends on the regulatory activity in question"); *In re Professional Sales Corp.*, 56 B.R. 753, 764 (Bankr. N.D. Ill. 1985) (noting that the bankruptcy court does not have the power to expand the license privileges of a debtor beyond what they would be outside bankruptcy).

Still, it is not impossible for a debtor to prevail on the theory that revocation of a license is stayed under subsection 362(a)(3). A few courts have held that the revocation by a governmental unit of certain types of privileges is indeed stayed under this subsection. For instance, in *In re Scott Housing Systems, Inc.*,⁸⁷ the bankruptcy court held that the enforcement of a zoning classification change, which was triggered by the passage of time, was stayed under subsection 362(a)(3).⁸⁸ The court reasoned that the change, which had the effect of "revoking" the old zoning classification of the debtor's land, was "clearly an act which limit[ed] or regulate[d] the debtor's use of the land," and had the "potential of adversely affecting [its] . . . value," and so qualified as an "act . . . to exercise control over property of the estate."⁸⁹

Moreover, the legislative history of this provision is somewhat ambiguous. The House Report on subsection 362(a) indicates that, under this provision, "[a]ll proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings."⁹⁰ Thus, while it is certainly the minority view, one might successfully argue that a license revocation which has the effect of adversely affecting the value of the debtor's collateral property, or limiting the use of such property, should be stayed under this section.⁹¹

B. The Discretionary Stay: Equitable Powers Under Section 105

1. Interaction of Sections 362 and 105

Under section 105 of the Code, federal bankruptcy courts are empowered to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Code.⁹² While most authorities recognize that section 105 operates to confer rather broad equitable powers on these courts, there is some dispute over the precise scope of this power. Along the environmental-bankruptcy interface, for instance, an oft-posed question is whether a federal bankruptcy court may enlist its equitable powers under sec-

87. *In re Scott Hous. Sys., Inc.*, 91 B.R. at 195.

88. H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S.C.C.A.N. 5787, 6297 (emphasis added). An equivalent of the term "license revocation" does not appear in the corresponding Senate Report, perhaps indicating that there existed some disagreement over the scope of the § 362(a)(3) stay in this area.

89. *Id.* at 194-95.

90. See *supra* note 88.

91. See, e.g., *In re Wengert Transp., Inc.*, 59 B.R. 226, 231 n. 2 (Bankr. N.D. Iowa 1986) (noting that a debtor may be able to obtain a stay under § 362(a)(3) where a state initiates an action to revoke a permanent operating certificate). Cf. *In re Gen-carelli*, 14 B.R. 751, 753 (Bankr. D.R.I. 1981) (indicating that license revocation proceedings may be stayed under § 362(a)(1) only if the proceedings would not somehow serve to protect the health and safety of the public).

92. 11 U.S.C. § 105 (1988). See *supra* note 32.

tion 105 to stay enforcement of a state's environmental laws, even where the section 362 automatic stay is inapplicable.⁹³

The vast majority of courts have held that section 105 does indeed confer upon bankruptcy courts the power to issue equitable stays in situations where section 362 does not apply.⁹⁴ These courts recognize that section 105, derived from the broadly-worded All Writs Statute⁹⁵ and expanded in scope from its predecessor in the former Bankruptcy Act,⁹⁶ was meant to confer ample equitable powers. This view is supported by the legislative history of section 105, which indicates that neither subsection 362(a), nor the exceptions listed under subsection 362(b), operate to limit the jurisdiction of the bankruptcy court or its power to issue injunctions:

The effect of [a subsection 362(b)] exception is not to make the action immune from injunction. The [bankruptcy] court has ample other powers to stay actions not covered by the automatic stay. Section 105 . . . grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The . . . bankruptcy court . . . [has] all the traditional injunctive powers of a court of equity Stays or injunctions issued under . . . [section 105] will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request

93. An example of this situation is when the state is taking an action pursuant to an exercise of its police powers, and is not seeking "enforcement of a money judgment" or seizure of estate property. See discussion *supra* part II.

94. See, e.g., *Penn Terra Ltd. v. Department of Env'tl. Resources, Pa.*, 733 F.2d 267 (3d Cir. 1984); *In re Security Gas & Oil, Inc.*, 70 B.R. 786 (Bankr. N.D. Cal. 1987); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175 (5th Cir. 1986); *In re Metro Transp. Co.*, 64 B.R. 968 (Bankr. E.D. Pa. 1986); *In re Norwesco Dev. Corp.*, 68 B.R. 123 (Bankr. W.D. Pa. 1986); *In re Beker Indus. Corp.*, 57 B.R. 611 (Bankr. S.D.N.Y. 1986); *In re Professional Sales Corp.*, 56 B.R. 753 (Bankr. N.D. Ill. 1985); *In re Williston Oil Corp.*, 54 B.R. 10 (Bankr. D.N.J. 1984); *In re Thomas Solvent Co.*, 44 B.R. 83 (Bankr. W.D. Mich. 1984); *In re Mason*, 18 B.R. 817 (Bankr. W.D. Tenn. 1982). See also 2 COLLIER ON BANKRUPTCY, *supra* note 42, ¶ 105.04, at 105-17 (court may use § 105 to enjoin acts which would otherwise be excepted from § 362 if "it determines that the acts would interfere with the bankruptcy case or if equity or substantial justice would require it").

95. 28 U.S.C. § 1651 (1988) provides in part: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

96. Section 2(a)(15) of the prior Act empowered the bankruptcy courts to issue only such orders, process, and judgments as were *necessary* for enforcement of the Code's provisions, and denied these courts the authority to enjoin or restrain another court. See 11 U.S.C. § 11(a)(15) (repealed 1979). Section 105 of the current Act permits bankruptcy courts to issue any orders, processes, or judgments which are *necessary or appropriate* to the enforcement of the Code's provisions, and contains no restriction on the courts' power to equitably enjoin the actions of other courts. 11 U.S.C. § 105(a) (1988).

relief from the stay. There are some actions, enumerated in the [362(b)] exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.⁹⁷

Thus, the express purpose behind the section 105 provision is to provide additional protection to the debtor which would not otherwise be available under section 362.

Since Rule 65 of the Federal Rules of Civil Procedure (governing injunctions and restraining orders) is applied to bankruptcy proceedings through Bankruptcy Rule 7065, discretionary action under section 105 may be undertaken only if the movant meets the traditional conditions routinely applied to requests for preliminary injunctions.⁹⁸ While the specific requirements may vary from jurisdiction to jurisdiction, this generally means that in order to obtain a discretionary stay the movant must show: (1) probability of irreparable harm to the moving party in the absence of relief; (2) no harm or minimal harm to the non-moving party; (3) the likelihood of success on the merits; and (4) no harm or minimal harm to the public interest.⁹⁹ If the movant debtor fails to meet any one of these pre-

97. S. REP. NO. 95-989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837 (citations omitted). *See* H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 342, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6298. *See also* H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5973 ("[T]he bankruptcy courts must have the power to enjoin actions not covered by the automatic stay, in order that the bankruptcy case may proceed unembarrassed by multiple litigation") (footnotes omitted).

98. *See, e.g., In re Kawano, Inc.*, 27 B.R. 855, 856 (Bankr. S.D. Cal. 1983) (applying four-part preliminary injunction test to determine whether injunctive relief should issue under § 105). *Cf. In re Vantage Petroleum Corp.*, 25 B.R. 471, 477 (Bankr. E.D. N.Y. 1982) (court noted that it was "unclear . . . whether the traditional test for the granting of a preliminary injunction is also applicable to [requests for equitable relief under § 105]," but assumed this to be the case). *See also*, FED. R. CIV. P. 65 and *supra* note 31.

99. *See, e.g., In re Norwesco Dev. Corp.*, 68 B.R. at 131. The third precondition of this four-part test, that the movant show "likelihood of success on the merits," has been variously interpreted. Some courts have interpreted the requirement to mean that the debtor must prove that it is likely that it will eventually prevail in the proceeding which is sought to be stayed. *See In re Commonwealth Oil Ref. Co.*, 805 F.2d at 1189 ("The inquiry for a preliminary injunction necessarily focusses on the outcome of a later proceeding . . ."). Other jurisdictions have defined the requirement in terms of the debtor's likelihood of success in the matter *presently* before the court. *See Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, *supra* No. 90-0228-B, slip op. at 8 n.4 (mem.). Some commentators have also suggested that, in the context of a bankruptcy case, the question under this portion of the test is not really whether the debtor can show likelihood of a success on the merits, but whether the debtor can prove "likelihood of a successful reorganization" if the requested stay is granted. *See 2 COLLIER ON BANKRUPTCY*, *supra* note 42, § 105.02, at 105-08. Clearly, it is important for a debtor to understand which of these standards the court in its

conditions, the discretionary stay will not issue.¹⁰⁰

2. *The Functional Scope of Section 105*

Asserting that section 105 may be invoked to issue discretionary stays under circumstances where section 362 provides no automatic protection, and stating in general terms the guidelines for issuance of such a stay, gets one only a portion of the way through the analysis of the courts' power under section 105. The central question still remains: May a bankruptcy court use its equitable powers under section 105 to stay proceedings which are brought by governmental units to enforce environmental laws? The courts are not in accord on this issue.

Some jurisdictions have adopted the view that section 105 may be invoked by a debtor to stay enforcement of a government regulatory order "to the extent that the exercise of a [governmental proceeding] threatens the assets of the debtor's estate"¹⁰¹ These courts often emphasize that, where state regulatory policy and bankruptcy policy collide, the court must enter into a delicate balancing of interests to determine whether or not to grant a stay of the state regulatory proceedings.¹⁰² Generally, relief is granted only in extraordinary circumstances when, for example, allowing the enforcement action to proceed would assuredly "ruin" the reorganizing debtor's estate,¹⁰³ cause severe financial loss to creditors,¹⁰⁴ result in

jurisdiction applies if the debtor is to succeed in moving for a § 105 stay.

100. See *In re Commonwealth Oil Ref. Co.*, 805 F.2d at 1189-90.

101. *In re Metro Transp. Co.*, 64 B.R. 973 (quoting *SEC v. First Fin. Group*, 645 F.2d 429, 440 (5th Cir. 1981)). The "threat to the estate's assets" test arose originally under § 2(a)(15) of the prior Bankruptcy Act, 11 U.S.C. 11(a)(15) (repealed 1979). See *In re Mason*, 18 B.R. at 824. Since the 1978 legislation did nothing to limit the bankruptcy courts' equity jurisdiction, cases decided under § 2(a)(15) of the prior Act are still considered adequate authority for interpretive purposes.

102. See *Penn Terra Ltd. v. Department of Env'tl. Resources, Pa.*, 733 F.2d at 273:

Concededly, in some individual situations, the exercise of State power, *even for the protection of the public health and safety*, may run so contrary to the *policy* of the Bankruptcy Code that it should not be permitted. The statute provides for such exigencies, however. The bankruptcy court, in its discretion, may issue an appropriate injunction, even if the automatic stay is not operative. 11 U.S.C. § 105.

(emphases added); *In re Security Gas & Oil, Inc.*, 70 B.R. at 793 (a debtor may be entitled to a § 105 injunction staying the enforcement of state environmental laws where those laws unduly interfere with the bankruptcy case and such interference outweighs the state's environmental concerns. Under such circumstances state law is preempted by the Bankruptcy Code).

103. See *In re Metro Transp. Co.*, 64 B.R. at 973 (state Public Utilities Commission [hereinafter PUC] action denying debtor's application for self-insurance stayed in part because, in the absence of relief, debtor would be forced out of business); *In re Mason*, 18 B.R. at 824 (state proceeding to revoke liquor license stayed because state action would deprive debtor's estate—which in large part was comprised of a retail liquor store—of a "substantial asset.").

"human suffering caused by employment displacement,"¹⁰⁵ or lead to the extinguishment of unique public services.¹⁰⁶

However, all of the decisions holding that section 105 powers can be enlisted to enjoin enforcement of state regulatory laws have one very interesting characteristic in common; they never mention the existence or operation of section 959(b). Under section 959(b), trustees and debtors in possession are commanded to "manage and operate the property in [their] possession . . . according to the requirements of the valid laws of the state in which such property is situated"¹⁰⁷ Here, in title 28, we find no mention of "delicate balancing tests" or exceptions for "extraordinary circumstances." The provision quite simply and clearly commands debtor compliance with *all* valid state laws.¹⁰⁸

In contrast, the majority of jurisdictions which have held that government enforcement of environmental laws cannot be stayed by invoking the court's equitable powers under section 105 have recognized and applied section 959(b).¹⁰⁹ These courts rest their decisions on the grounds that section 959(b) is clear and unambiguous in its terms, that the Code was not intended to expand debtors' property rights beyond what they would be in Chapter 11 or to give debtors a competitive advantage in the marketplace, and that section 959(b) serves as an express limitation on the bankruptcy court's jurisdiction which indicates in certain terms that bankruptcy courts do not

104. See *In re Metro Transp. Co.*, 64 B.R. at 973 (state PUC action denying debtor's application for self-insurance stayed in part because, in the absence of relief, creditors would suffer severe financial loss); *In re Mason*, 18 B.R. at 824 (state proceeding to revoke debtors' liquor license stayed because, in the absence of a stay, the debtors' attempts to pay their creditors would be "substantially frustrate[d].").

105. *In re Metro Transp. Co.*, 64 B.R. at 973.

106. See *id.* at 973-74 (state PUC order denying debtor's application for self-insurance stayed in part because, in the absence of the requested relief, half of the existing taxi-cab service available to the citizens of Philadelphia would be lost).

107. See 28 U.S.C. § 959(b) (1988), *supra* note 35.

108. At least one court which did take notice of § 959(b) did not read that provision as absolute. See *In re Security Gas & Oil, Inc.*, 70 B.R. 786, 795-96 (Bankr. N.D. Cal. 1987). Rather, the court interpreted § 959(b) to be only an expression of congressional intent to include the legitimate interests of the state in the equitable balancing calculus. With regard to the operation of §§ 105 and 959(b), the court noted, "In determining whether to enjoin an environmental . . . order under section 105, the Bankruptcy Court should weigh the State's interests against the policies of the federal Bankruptcy Code" *Id.* at 796. See *supra* note 33.

109. Note that § 959(b) applies only to trustees or debtors who "manage and operate" a property. This section thus does not generally apply to debtors who cease operations or liquidate under another section of the Code. See, e.g., *In re Scott Housing Systems, Inc.*, 91 B.R. 190, 195 (Bankr. S.D. Ga. 1988); *In re Security Gas & Oil, Inc.*, 70 B.R. at 796; *In re Thomas Solvent Co.*, 44 B.R. 83, 88 (Bankr. W.D. Mich. 1984). But see *In re Quanta Resources Corp.*, 739 F.2d 912, 919 (3d Cir. 1984) (since even in Chapter 7 a trustee may be authorized to "operate or manage" a business, there is no reason to suppose § 959(b) will be inapplicable to *all* liquidating debtors).

have the equitable power under section 105 to preempt enforcement of valid state laws.¹¹⁰ Additionally, some courts have simply applied the four-part test for the grant of a preliminary injunction¹¹¹ and have concluded that stays of environmental laws nearly always disserve the public interest, and hence are disallowed.¹¹²

Indeed, the majority position is well-grounded in the plain meaning of the Code provisions involved. First, section 959(b), as noted above, expressly commands that trustees and debtors in possession *shall* manage and operate the debtor's estate in accordance with all valid state laws.¹¹³ There is no equivocation or ambiguity in this language. Second, the terms of section 105 explicitly indicate that the bankruptcy court's exercise of equitable jurisdiction is limited to issuing orders, process, and judgments which are appropriate to "carry out the *provisions* of this title."¹¹⁴ The section does *not*, as the minority courts might indicate, empower the court to exercise its discretion to carry out the broad and somewhat vague *policies* of the Code, unless such policies are embodied by a specific *provision* of title 11.¹¹⁵ Since no Code *provision* expresses a Code "policy" which indicates that a reorganizing debtor should be shielded from state enforcement of environmental laws, and since section 959(b) ex-

110. See, e.g., *In re Beker Indus. Corp.*, 57 B.R. 611, 623-24 (Bankr. S.D.N.Y. 1986) (there is no support for the assertion that § 105 is to be used to bring about a change in the regulatory environment in which the debtor operates, and an ongoing business is not to be given a competitive edge merely by virtue of its attempt to reorganize); *In re Professional Sales Corp.*, 56 B.R. 753, 762-64 (Bankr. N.D. Ill. 1985) (allowing debtor to sidestep state enforcement of environmental laws would expand the debtor's property rights impermissibly, would promote undesirable preferential treatment of Chapter 11 debtors over their solvent competitors, and would be repugnant to the plain meaning of § 959(b)).

111. See *supra* notes 95-97 and accompanying text.

112. See *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1190 (5th Cir. 1986) (dicta). Other courts have also found that debtors seeking to enjoin enforcement of state environmental laws must necessarily fail the four-part preliminary injunction test because the element of "irreparable harm" can never be established in such a case. This is true because the debtor "is not injured in a legally cognizable way by having to comply with valid state statutes not enforced with bad faith." *In re Beker Indus. Corp.*, 57 B.R. at 623.

113. See 28 U.S.C. § 959(b) (1988), *supra* note 35.

114. 11 U.S.C. § 105(a) (1988) (emphasis added), *supra* note 32.

115. As one commentator has noted, there are really two schools of thought on this issue. One school recognizes that certain "policies" behind the Code are implied, but not stated, in the statutory language and believes that § 105 gives bankruptcy courts the authority to "fill in the gaps" left by that language. The other school construes § 105 narrowly to permit its use only when necessary to carry out a specific and explicit provision of the Code. See 2 COLLIER ON BANKRUPTCY, *supra* note 42, ¶ 105.01. Neither school, however, would expand the use of § 105 to *contradict* an express command of the statutory language like that contained in § 959(b). See, e.g., *Saravia v. 1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823, 826 (D.C. Cir. 1988) (debtor had to comply with state housing regulations where there was no direct conflict between the actions required by state law and any *particular provision* of the Code).

pressly commands debtor compliance with such laws, section 105 may not be invoked to override their enforcement. Further, proponents of this school of thought cite the express language contained in subsection 362(b), which in part permits governmental units to proceed with enforcement actions so long as such enforcement action is not initiated to procure a money judgment.¹¹⁶ This language, it is argued, is evidence that where Congress wished to empower the bankruptcy court to stay enforcement of state regulatory laws, it expressly conferred such power. If the state action does not fit within an explicit exemption, it should not be stayed by equitable means in contradiction of Congress' clear intent.¹¹⁷

The legislative history behind sections 105 and 362 also supports the majority interpretation. Both the Senate and House reports indicate that section 362 is intended to preempt state law: "[S]ection [362 is] intended to be an express waiver of sovereign immunity of the Federal Government, and an *assertion of the bankruptcy power over State governments under the supremacy clause notwithstanding a State's sovereign immunity*."¹¹⁸ The legislative history underlying section 105 contains no similar language. In the absence of a clear expression of congressional intent to impart preemptive powers to a federal provision, such intent should not be lightly inferred.¹¹⁹

The majority position also finds support in some United States Supreme Court decisions. In *Norwest Bank Worthington v. Ahlers*,¹²⁰ the Supreme Court held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."¹²¹ In short, this means that the court's equitable powers under section 105 cannot be invoked in a manner which is inconsistent with the statutory language and legislative history of the Code. This would seem to indicate that since an injunction of state enforcement of valid environmental laws would operate to nullify the explicit commands of section 959(b), bankruptcy courts cannot claim to possess such power.¹²² Indeed,

116. 11 U.S.C. § 362(b)(5) (1989), *supra* note 48.

117. See, e.g., *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 509 (1986) (Rehnquist, J., dissenting) ("[W]hen Congress *was* so concerned [about enforcement of state environmental regulations] it expressed itself clearly, specifically exempting some environmental injunctions from the automatic stay provisions of section 362 of the Code . . .") (citations omitted).

118. S. REP. No. 95-989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837; H.R. REP. No. 95-595, 95th Cong., 2d Sess. 342 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6299 (emphasis added).

119. See *infra* note 128.

120. 485 U.S. 197 (1988).

121. *Id.* at 206.

122. While *Ahlers* did not expressly address the operation of § 105, courts have employed the same rationale expressed in *Ahlers* and have held that the bankruptcy court's equitable discretion under § 105 is limited and cannot be used in a manner inconsistent with other Code provisions. See *In re Plaza de Diego Shopping Ctr., Inc.*,

the Court has expressly stated, without specifically addressing the interaction of sections 105 and 959(b), that "we do not question that anyone in possession of [an abandoned] site . . . must comply with the environmental laws of the State Plainly, [a] person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions."¹²³

Still, the minority position is not entirely without merit. First, though the Supreme Court has never conclusively evaluated the effect of section 959(b) in the context of state environmental law enforcement,¹²⁴ it is clear that section 959(b) is not an omnipotent provision. A debtor need not, for instance, comply with valid state laws which are enforced merely to protect a state's pecuniary interests or to collect a money judgment under section 362. Nor is the bankrupt bound to abide by state laws which are contrary to the provisions of the Code, since under preemption analysis the Code must prevail over contradictory state legislation.¹²⁵ Since it is clear that Congress did not literally intend to require debtors to comply with *all* valid state laws,¹²⁶ a persuasive argument can be made that it is proper from a policy standpoint to engage in a discretionary "balancing test" to determine, on a case-by-case basis, when and if a debtor should be required to abide by a particular state law, particularly where denying discretionary relief will do great harm to the debtor's estate, and hence frustrate the central spirit of the Code.¹²⁷

911 F.2d 820, 830-31 (1st Cir. 1990); *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986); *In re Quanta Resources Corp.*, 739 F.2d 912, 917 (3d Cir. 1984); *Johnson v. First Nat'l Bank of Montevideo, Minn.*, 719 F.2d 270, 273 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984).

123. *Ohio v. Kovacs*, 469 U.S. 274, 285 (1984).

124. In *Ahlers*, the Court spoke in general terms about the scope of the bankruptcy court's equitable powers. While it did state that these powers cannot be exercised in a manner inconsistent with the provisions of the Code, it did not address the effect of provisions promulgated under other titles, such as 28 U.S.C. § 959(b). Similarly, in *Kovacs*, the Court did not address the scope or applicability of § 959(b) directly, but only referred to that section as persuasive authority indicating that Congress did not intend the Code to override *all* state environmental laws.

125. See, e.g., *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (acts of state legislatures which interfere with or are contrary to the laws of Congress, made pursuant to the Constitution, are invalid under the Supremacy Clause). See also *In re Torwico Elects., Inc.*, 131 B.R. 561, 575 (Bankr. D.N.J. 1991) (state legislation which purports to limit the effect of bankruptcy on environmental clean-up obligations, or to create additional obligations for filing debtors, is void under the Supremacy Clause).

126. See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 505 (1986). The Court in *Midlantic* noted that § 959(b) provided evidence that "Congress did not intend for the Bankruptcy Code to pre-empt *all* state laws." *Id.* (emphasis added). Implicit in this assertion is that Congress may have intended to preempt *some* state laws.

127. Viewing the Code from this angle, §§ 362(a) and (b) provide express exemptions from debtor compliance with state law under § 959(b). These two subsections operate to establish the fact that Congress did not intend § 959(b) to control in every case. Having established the quasi-controlling nature of § 959(b), it is not entirely

Second, the language of section 959(a) has often been ignored by majority courts addressing the interaction of sections 105 and 959(b). The latter section explicitly provides that although trustees, receivers, and managers of a debtor's property may be sued, the actions against them "shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice"¹²⁸ When read in conjunction with subpart (b),¹²⁹ this section seems to indicate that, while a debtor in possession may be sued under valid state laws, suits brought in furtherance of those laws are still subject to the equity powers of the presiding court. Certainly among those equitable powers is the authority to grant preliminary injunctions pursuant to Federal Rule of Civil Procedure 65.

Indeed, there appears to have been at least a little congressional confusion over the scope and effect of section 105. In an appendix to the House report on the 1978 Act, one commentator notes that the 1978 law would change the operation of the automatic stay to correct misinterpretations of the old automatic stay provision which had operated in some cases to enjoin state enforcement of environmental and consumer fraud laws.¹³⁰ The new stay provision, the commentator explained, was structured explicitly to allow states to enforce their regulatory powers under the exceptions outlined in section 362(b). This type of open-ended authorization to enforce state regulatory laws was acceptable, the author noted, because "[t]he bankruptcy court has ample additional power [under section 105] to prevent damage to the bankrupt estate by such actions on a case-by-case basis."¹³¹ Thus, the power of the bankruptcy court to enjoin state enforcement actions permitted under section 362, in this instance at least, was presumed, with no mention of the existence or operation of section 959(b).

However viable such arguments may be, the fact remains that the great weight of authority leans heavily toward disallowing the equi-

illogical to conclude that Congress may have intended § 105 to act as a further "open exemption" from compliance with valid state laws in cases where the debtor can prove the elements of the four-part preliminary injunction test. *See supra* text accompanying notes 95-97.

128. 28 U.S.C. § 959(a) (1989) provides, in full:

Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

129. For the text of this provision, see *supra* note 35.

130. HEARINGS ON H.R. 31 AND H.R. 32 BEFORE THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 94th Cong., 1st and 2d Sess. 166, 174-75, reprinted in 1978 U.S.C.C.A.N. 5787, 6127, 6135 (statement of David H. Williams, Attorney, Federal Trade Commission) (footnote omitted).

131. *Id.* at 6135.

table stay of state environmental law enforcement. Language from the Supreme Court and from nearly every jurisdiction which has addressed this issue in the context of section 959(b) indicates that, absent very specific commands to the contrary, section 105 will *not* be read to preempt enforcement of state legislation designed to protect health and safety. While this may reflect a very conservative approach to the interpretation of the bankruptcy court's equitable power under section 105, it is certainly an approach which is consonant with established rules of preemption analysis.¹³²

III. *WILNER WOOD PRODUCTS Co.* REVISITED

In *Wilner Wood*, both the bankruptcy court¹³³ and the United States District Court¹³⁴ implicitly agreed on one issue: the automatic stay of section 362 was not applicable to the instant case. This conclusion seems entirely rational given that: (1) the State was seeking to enforce the environmental regulation pursuant to protecting the health, safety, and general welfare of the public;¹³⁵ (2) the State was not seeking simply to protect its pecuniary interest in the estate;¹³⁶ and (3) the State was not attempting to enforce a judgment which was either in form or substance a "money judgment."¹³⁷ Perhaps the debtor could have argued that the State's denial of the emissions license was an "act to obtain property of the estate" under sections 362(a)(3) and 541, but this issue was apparently not raised in the first proceeding and, even if it had been, the debtor's likelihood of success in employing such an argument would have been minimal given the current state of the law.¹³⁸

The real point of contention between the two decisions was whether federal courts have the equitable power under section 105

132. See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986) ("If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'") (citation omitted); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (preemption must be explicit or compelled due to an unavoidable conflict between the state law and the federal law); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (consideration of whether a state provision violates the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law); *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir. 1942), cert. denied, 317 U.S. 683 (1942) (where the traditional police power of the state is deemed to be withdrawn by Congress in bankruptcy legislation, evidence of that withdrawal in fit language should be found within the act).

133. See *Wilner Wood I*, *supra* note 28; *Wilner Wood II*, *supra* note 26.

134. See *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B (D. Me. May 10, 1991) (mem.).

135. See discussion *supra* part II.A.1.

136. *Id.*

137. See *supra* part II.A.2.

138. See *supra* part II.A.3.

to issue a *discretionary* stay of the state action despite the inapplicability of the section 362 automatic stay. While it has been well established that under some circumstances a section 105 stay may issue where section 362 is inapplicable,¹³⁹ a closer look at both the bankruptcy and district courts' decisions in *Wilner Wood* is instructive on a narrower issue, namely, whether a federal bankruptcy court has the equitable authority to enjoin a state's enforcement of state environmental laws to protect the interests of debtors and creditors.

The federal bankruptcy court's opinion, which determined that section 105 did operate to empower the court to enjoin enforcement of state environmental actions, was grounded primarily in a misinterpretation of *In re Security Gas & Oil, Inc.*¹⁴⁰ In *Security Gas & Oil*, the State of West Virginia brought an enforcement action to compel the debtor to reclaim certain abandoned oil and gas wells pursuant to state law. The debtor sought refuge from the State, and in bankruptcy court prayed for an injunction under section 105 to foreclose further efforts by the State to terminate the debtor's operations or to force reclamation of the abandoned wells. After a thorough review of the case law in this area, the court concluded:

[A]n environmental clean-up order should not be enjoined under section 105 where that order is designed to bring a debtor's continuing operations into compliance with state law. A bankruptcy debtor operating a business avails itself of the protections of state law as much as any other business, and should be subject to the relevant burdens state law imposes. Section 959(b) of the Judicial Code requires a bankruptcy trustee or debtor-in-possession to operate any continuing business in conformity with applicable state laws.¹⁴¹

Having asserted that this is the law for debtors-in-possession who are operating a *continuing business on the property subject to the environmental order*, the court went on to note that "[a] more difficult question arises where the debtor continues to operate a business, *but does not operate on the property subject to the clean-up order or operates a line of business wholly unrelated to the property to be cleaned up.*"¹⁴² The court then laid out a nine-part "equitable balancing test" to be applied only under just such circumstances.¹⁴³

The *Security Gas & Oil* test was thus inapplicable to the facts of *Wilner Wood*. The *Security Gas & Oil* court never intended its application to extend to debtors who, like *Wilner Wood*, are continuing

139. See *supra* part II.B.1.

140. 70 B.R. 786 (Bankr. N.D. Cal. 1987). See *Wilner Wood I*, *supra* note 28.

141. *In re Security Gas & Oil, Inc.*, 70 B.R. at 796.

142. *Id.* (emphases added).

143. *Id.* at 796-97. See *supra* note 33.

operations on the very site subject to environmental enforcement. Moreover, in addition to misapplying *Security Gas & Oil*, the bankruptcy court in *Wilner Wood* never acknowledged section 959(b) or cited a case for the proposition that injunctive relief under section 105 may be granted to override state laws in the face of that provision.¹⁴⁴ In short, the court appears to have missed the issue and arrived at the "wrong" conclusion.¹⁴⁵

On appeal the United States District Court picked up the ball the bankruptcy court had dropped. The district court recognized section 959(b) as a controlling provision and decided, as have the majority of courts in this arena,¹⁴⁶ that its express command could not be overridden by the bankruptcy court's general equity powers under section 105. The court did recognize the minority view in a footnote,¹⁴⁷ but found the majority view to consist of the "better-reasoned" cases without fully describing why the court thought this was so.¹⁴⁸ Perhaps the reason is to be found near the end of that opinion. In concluding that section 959(b) controlled in this case, the court avoided having to address the much more difficult issue of "whether the Constitution permits a bankruptcy court to issue an injunction against the State without the State's consent."¹⁴⁹

IV. CONCLUSION

The legal power of a federal bankruptcy court to enjoin enforcement of state environmental laws is largely a matter of settled law. Under the automatic stay provision of the Bankruptcy Code, state enforcement of environmental laws must be permitted to proceed unless (1) the State is acting solely to protect its pecuniary interest in the debtor's estate,¹⁵⁰ (2) the State is acting to enforce against the debtor what is in form or substance a money judgment,¹⁵¹ or (3) the State is acting to obtain property of the bankrupt's estate.¹⁵²

As a practical matter, state enforcement of environmental regulations will always pass the "pecuniary interest" test since such enforcement, while perhaps pecuniary in part, always serves some legitimate public purpose such as deterrence or protection of health,

144. The bankruptcy court neglected to do this despite the fact that the court in *Security Gas & Oil* did reference § 959(b) in its decision. *Id.* at 796.

145. Or at the very least, the bankruptcy court reached a conclusion that has been rejected by the majority of courts addressing this issue. *See supra* text accompanying note 128.

146. *See supra* text accompanying note 128.

147. *Wilner Wood Prods. Co. v. Maine Dep't of Env'tl. Protection*, No. 90-0228-B, slip op. at 6 n.3 (D. Me. May 10, 1991) (mem.).

148. *Id.*

149. *Id.* at 8.

150. *See discussion supra* part II.A.1.

151. *See discussion supra* part II.A.2.

152. *See discussion supra* part II.A.3.

safety, or general welfare.¹⁵³ As to the second exception, states will be permitted to bring and enforce actions which seek to compel performance calculated to prevent future public harm, but not to bring suit to recover a sum certain in actions that sound in restitution or compensation for past damages.¹⁵⁴ Finally, under the last exception, the minority view indicates that a federal court may stay the revocation of certain state-issued environmental licenses, permits, or other privileges.¹⁵⁵

The more difficult questions arise in the context of the bankruptcy court's exercise of its equitable authority to enjoin enforcement of state environmental laws under section 105. The majority view recognizes that the plain language of section 959(b), the legislative history behind sections 362 and 105, and well-established judicial rules relating to federal preemption of state law operate to foreclose the exercise of such broad equitable authority.¹⁵⁶ The minority view, on the other hand, argues that Congress must have intended to grant bankruptcy courts the power to enjoin enforcement of state laws where such enforcement would run contrary to the broad policies of debtor and creditor protection which underlie the current Code.¹⁵⁷ While we may never know how Congress intended for section 105 to operate in the context of state environmental law enforcement, or even if it contemplated the friction that was to arise from the interaction of these two bodies of law,¹⁵⁸ there is a very strong policy argument to be made for the majority position.

The middle ground between bankruptcy and environmental law should be established such that the operation of the bankruptcy court's legal and equitable staying powers are in accord with our fundamental democratic principles of fairness in the marketplace and with our undoubted interest in maintaining a high quality of life through environmental protection. Enforcing the majority view of the courts' equitable powers under section 105 serves both of these ends by striking a principled compromise.

By not allowing section 105 to be invoked to stay enforcement of state environmental statutes which seek to remedy present or impending harms, the majority position successfully prevents exacerbation of existing environmental hazards and keeps the Code from becoming an absolute "shield" for environmental wrongdoers. Actions brought by governmental creditors seeking redress for past en-

153. See *supra* notes 52-58 and accompanying text.

154. See discussion *supra* part II.A.2.

155. See discussion *supra* part II.A.3.

156. See discussion *supra* part II.B.2.

157. See *supra* notes 98-103, 120-27, and accompanying text.

158. See Smith, *supra* note 7, § 1.01, at 1-3 (concluding that the conflict between bankruptcy and environmental law was "dimly foreseen by the drafters of the [1978 Act]").

vironmental harms which no longer exist due to government clean-up programs¹⁵⁹ are stayed and dealt with as are the claims of any other creditor, thereby eliminating any preferential treatment toward governmental creditors and simultaneously protecting the interests of non-governmental creditors. Relieving debtors of the duty to comply with environmental statutes which sound in compensation also provides the debtor with some breathing space and enhances its opportunity to successfully rehabilitate its operation and perhaps, eventually, to meet its responsibility with regard to environmental legislation. At the same time, the majority's position fosters fundamental fairness in the marketplace by requiring reorganizing debtors to operate prospectively in the same regulatory environment as its competitors, and thus prevents bankruptcy from becoming an instrument of unfair competition.

In the final analysis, the result of the implemented policy is all that really matters. A strained reading of statutory language or legislative history, or an over-reliance on a handful of nonrepresentative decisions may lend some technical weight to the minority view of the operation of section 105, but the result of such an interpretation is largely unacceptable. Allowing bankruptcy courts to enjoin enforcement of state environmental laws might indeed help some debtors to get back on their feet and become environmentally responsible operators. But on the whole, such a policy would severely handicap efforts to maintain environmental quality—a concern of primary importance in today's society—and would make bankruptcy a welcome haven indeed for the polluter and the poorly-managed.

David A. Brenningmeyer

159. See, e.g., the Superfund provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1989).